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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 855

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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STATEMENT

The petition for habeas corpus in the United States District Court had attached as exhibits the original record and the trial proceedings in the Criminal Court of Record of Polk County, Florida, and the said original record has been separately certified to this Court.

In this brief references to this record will be denominated as "TR"; to the record of the Court below as "R", and to the appendix of the petition as "APP".

The situation of the parties as given in the petition is concurred in by the respondent.

FACTS ON THE TRIAL

In view of the fact that the rather lengthy record has not been printed, the respondent deems it necessary and of assistance to the Court to give a brief resume of the facts on the trial of the case.

The facts as revealed to the jury in the trial are that the petitioner, Harlan Blackburn, who lived in Orlando, Orange County, Florida, set up, operated and conducted a lottery known as "Cuba" or "Bolita" in several counties of the State of Florida adjacent to Orange County, Florida, to-wit: Osceola, Polk and Hillsborough counties. The petitioner, Blackburn, was tried, along with eight (8) other persons in a five-count information. During the course of the trial one John Henry Speed changed his plea of "not guilty" to that of "guilty"; however, out of an abundance of caution the trial court refused to make this fact known to the jury. (TR 1545)

According to the State's evidence the lottery known as "cuba" or "bolita" is carried on by the sale of chances on numbers from 1 to 100, both inclusive. The winning number on this lottery is determined each Saturday by taking the last two digits of the Grand Prize on the National Lottery at Havana, Cuba, which is broadcast between the hours of 2:00 and 4:00 P. M. on Saturday afternoon.

The organizational setup of the illegal lottery known as "cuba" or "bolita" is in the following manner:

At the top of the organization is the principal operator or the "banker" who finances the operation with his money and takes the profits, less the expenses, from the

operation. Beneath the banker are persons known as "check up" men or women, as the case may be, and underneath the check up men are "pick up" men or women, as the case may be, and beneath these people are the "sellers" or "writers" who contact and sell chances to the general public. The chances are sold during the week and on Saturday at approximately noon the writers tally up their sales, the "pick up" man contacts the "writer", picks up the record of the amount of business that the writer sold during the week and transmits this record, along with the cuba or bolita tickets to the "check up" man who, from the records of the writers furnished him by the "pick up" men, makes a final tally of the total amount of business done for the week and posts same on an "in and out" sheet, showing the gross business done and the total amount of money paid out due to "hits" or chances that have been purchased on the winning number. (TR 713-720). This operational setup is not unlike the one described by this Court in the case of *United States v. Calamaro, 354 U. S. 351, 1 Law Ed 2d 1394, 77 Sup. Ct. 1338.*

The "check up" man was paid a percentage of three (3%) per cent of the gross amount of business sold during the week. The "pick up" men received a straight salary of fifty ($50.00) dollars per week and expenses (gasoline and oil), and the "writers" or "sellers" received fifteen (15%) per cent of the total amount of tickets sold, or in their language, fifteen cents of each dollar of business sold. (TR 527, 539, 546)

In this particular lottery the evidence shows that petitioner, Harlan Blackburn, was the principal operator and banker; that Blackburn had as his "check up" man one

Frank Duskin of Polk County, who took his orders and instructions from the petitioner; that Duskin purchased two (2) automobiles for the "pick up" people at petitioner Blackburn's instructions and with money furnished by Blackburn and took title to the automobiles in his (Duskin's) name because petitioner, Blackburn, did not want the automobiles listed in his name (TR 489); that operating under Duskin from time to time were three (3) "pick up" people, John Henry Speed, who changed his plea from "not guilty" to "guilty" during the course of the trial, Lawrence Wall and his wife Sing Wall, all negroes. Duskin, a white man, pled guilty to the charges laid against him in the information and testified on behalf of the State. Cecil Redditt was granted a continuance and not tried with the petitioner. Redditt and Philip Lino, both white men, were persons sent by principal operator, petitioner, Blackburn, on a given Saturday to "check" on Frank Duskin, the "check up" man, for double security, or in the language of the business, to keep the "check up" man honest.

During the summer of 1952 for several Saturdays Frank Duskin had the "pick up" woman, Sing Wall, check the lottery tickets in to him at his home in Lakeland, Florida; later he changed the check up place to another point in Polk County, the "Blue Bird Cafe" and it was at this place on July 19, 1952, while Duskin and Philip Lino were checking up the results of the lottery sales that they were surprised by the then Constable, Pat Gordon, a man who was later elected Sheriff and other officers in a raid. On each Monday, around 1:00 P. M., Frank Duskin would take the profits from the lottery and an "in and out" sheet to the principal operator, the petitioner, Harlan Blackburn, and deliver it to him at Orlando, Orange County, Florida,

at the home of his girl friend, Norma Bridges. (TR 506-507); that after the raid by the Constable, Frank Duskin was directed by petitioner, Harlan Blackburn, to secure a "check up" place in Hillsborough County, that things in Polk County were too hot; that in accordance with this instruction Duskin secured permission from a negro woman named "Geraldine Berry" who lived on the edge of Hillsborough County, just over the Polk County line, to use one of her buildings for checking up the lottery business on Saturdays. He checked at this place and also at other places in Hillsborough County and notified the "pick up" people to bring the lottery paraphernalia to him at the new "check up" points in Hillsborough County, and as usual continued to check in the profits from the lottery, along with the "in and out" sheet to petitioner, Harlan Blackburn, each Monday at the designated place in Orlando, Orange County, Florida. (TR 874-880)

Frank Duskin, about September 1, 1952, after he and Philip Lino had been arrested by the Constable, decided to tell the law enforcement officers about the entire operation. (TR 897) From his testimony and assistance the officers secured search warrants for the homes and business places of a large number of the lottery writers or sellers and secured arrest warrants for other persons who were aiding and assisting in the operation of this lottery. On Saturday, the 20th day of September, a coordinated search was made by law enforcement officers of Polk County and other counties, particularly Hillsborough and Orange, which revealed a vast amount of lottery paraphernalia and brought about the arrest and finally the trial and conviction of petitioner, Harlan Blackburn, and his several co-defendants.

QUESTIONS PRESENTED

Petitioner presents two (2) questions which he states as follows:

> **1. Whether a conviction based on an information charging several defendants with per se unrelated, although similar crimes, without allegation of conspiracy or concert of action, nor involvement of each with the crimes of the other, and subsequent joint trial of said misjoined defendants, is subject to collateral attack as being violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States without regard to an affirmative showing of prejudice beyond what may be logically inferred from the nature of the proceedings.**
>
> **2. Whether it is a violation of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States for a state authority to proceed to trial over objection urged in an area which for two years had been infected with a hostile press campaign against the defendant, with approximately ninety seven emotionally toned articles, almost all stating or inferring defendant was a criminal, having been published.**

The respondent believes the sole question to be decided by this Court is substantially as follows:

> **1. WAS THE PETITIONER DENIED DUE PROCESS OF LAW AND EQUAL PRO-**

TECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE THE STATE TRIAL COURT DENIED HIS

(1) MOTION TO QUASH INFORMATION

(2) MOTION FOR CHANGE OF VENUE

(3) MOTION FOR SEVERANCE?

The United States Court of Appeals for the Fifth Circuit answered this question in the negative.

REASONS FOR DENYING THE WRIT

In principle the same question was presented to this Court on petition for certiorari to the Supreme Court of Florida, which petition was denied. *Harlan Blackburn v. State of Florida, 350 U. S. 987, 100 Law Ed. 854, 76 Sup. Ct. 473.*

The petitioner claims that the charging instrument misjoins the petitioner with other defendants and that the misjoinder is of such a degree that it should be held to be per se violative of due process. For this position he cites *McElroy v. United States, 164 U. S. 76 (1896); Houchins v. State, 154 Fla. 283, 17 So. 2d 82 (1944).*

The Houchins case, supra, contained two counts in the information. One count charged a violation of the uniform sales of securities act and the other charged embezzlement. The State admitted that the information contained two separate distinct and unrelated offenses.

Florida's lottery statute (Section 849.09) provides alternative provisions. The information in this case is in several counts, charging the offense to have been committed by different methods, embraced within the alternative provisions of the statute. The information was approved by the trial court (TR 56) and by the Supreme Court of Florida. *(Blackburn v. State, Fla., 83 So. 2d 694.)* See also *Wheeler v. State, Fla., 72 So. 2d 364; Fletcher v. State, Fla., 65 So. 2d 845; Gaskins v. State, Fla. 89 So. 2d 867; Nelson v. State, Fla., 83 So. 2d 687; Adams v. State, Fla., 66 So. 2d 598; Bueno v. State, 40 Fla. 160, 23 So. 862.*

A fair interpretation of the charging instrument as a whole clearly demonstrates that defendants were connected in the commission of the offenses charged and factually there is no misjoinder. This was the finding of the trial court in denying the motion to quash. (TR, General Index, page 11) The Circuit Court on this point said:

> ". . . The state's evidence upon the trial of the defendant and his co-defendants for the several substantive offenses clearly went to prove that there was but one vast lottery operation, covering several counties, operated, *backed and banked by appellee.* No further discussion is needed to demonstrate that there was *no such misjoinder of parties* or of offenses as to amount to a denial of due process of law or equal protection of the laws." (Emphasis supplied.)

The respondent does not believe that this Court is willing to substitute its established controlling principles

of "fair trial", "due process" and "equal protection" as announced in *Palko v. Connecticut, 302 U. S. 319, 82 Law Ed. 288, 58 Sup. Ct. 149; Kepner v. United States, 195 U. S. 100, 49 Law Ed. 114, 24 Sup. Ct. 797; Snyder v. Massachusetts, 291 U. S. 97, 78 Law Ed. 674, 54 Sup. Ct. 330, 90 A. L. R. 575; Betts v. Braay, 316 U. S. 455, 86 Law Ed. 1594, 62 Sup. Ct. 1252, Lisenba v. California 314 U. S. 219, 86 Law Ed. 166,* for some new recondite legal conception which is clearly theoretical in nature.

Petitioner objects to being tried with his co-defendants. Reduced to its simplest terms, petitioner's claim is that guilt spilled over on him because he was required to be tried with other persons interested in the same lottery. The respondent fails to see how the "banker", the principal operator and the "brains" of the lottery, the person who directed the overall activity and secured the profits therefrom, could be prejudiced by having to be tried as a co-defendant with his hired help. Certainly if any guilt in a case of this kind is going to spill over by association, the spilling over, if any, would be from petitioner to his agents or hired help.

THE VENUE QUESTION

As was pointed out by the trial court in its order denying a change of venue (APP "A", page 4) most of the newspaper articles attached to the motion had been printed prior to petitioner being tried and convicted for conspiracy to violate the lottery laws in March of 1953 and no difficulty was experienced in selecting a jury for that trial.

This case was tried in October, 1953, approximately one year after petitioner was arrested and long after most

of the newspaper articles were printed. Aside from this, petitioner by his own actions, fleeing the jurisdiction of the State and resisting extradition from the State of Texas, created a large amount of the publicity. The facts and circumstances relating to publicity surrounding this case cannot begin to compare with that surrounding *Shepard v. State of Florida, 341 U. S. 50, 71 Sup Ct. 549; Johnson v. State of Florida, 112 Fla. 189, 150 So. 278; Juelick v. United States, 214 Fed. 2d 950, Fifth Circuit; Sheppard v. Ohio, 352 U. S. 910, 1 Law Ed. 2d 119, 77 Sup. Ct. 118.*

Shepard v. Florida, supra, was a rape case. Four negroes were alleged to have raped a young white girl, seventeen years of age. Newspapers published as a fact that the defendant had confessed to the crime and attributed it to the sheriff. It was never denied, yet never introduced in evidence or produced in Court. The defendants' parents' home was burned amidst great disorder in the community. The case was reversed because the negro race had been discriminated against by the method of selecting a jury.

The *Johnson* case, supra, involved the murder of two police officers on Sunday, grand jury indicted on Monday and defendants immediately forced to trial amongst great and violent community sentiment, mobs assembled and demanded the defendants be turned over, National Guard called out and defendants transferred from one jail to another.

In *Juelick*, supra, a Deputy United States Marshal was murdered while transporting a prisoner. Every man on the jury had sworn that he had an opinion that the defendant was guilty prior to the trial. Nevertheless, the

trial proceeded and this Court held in the last two mentioned cases that either a change of venue or a continuance of the case for a cooling off period was in order.

In the case at bar, there was a long period of delay between the publishing of a majority of the newspaper articles and the time of the trial of the petitioner. This cooling off period amounted to a continuance and as the Circuit Court pointed out no difficulty was experienced in selecting a jury. To be sure, the twenty-six jurors who were excused for having fixed opinions were excused by the trial court. Petitioner was not required to use his peremptory challenges for that purpose.

The claim of prejudice against petitioner in his motion for change of venue that he had been rendered "odious" to the people of Polk County and that he and charges against him had been a "political football" in the sheriff's race is equally as unjustified as the claim of prejudice by adverse newspaper publicity. Facts and matters of which the trial court could and evidently did take judicial knowledge were that Pat Gordon, the candidate for sheriff, to whom the claim was made that petitioner was friendly, made the first arrest in Polk County of petitioner's agents, Duskin and Lino on July 19, 1952. Between that time and the date of the trial, October, 1953, notwithstanding petitioner's claim, Pat Gordon had been elected sheriff of Polk County by a large majority and was sheriff at the time of the trial of petitioner. (TR 540-541) This demonstrates beyond any doubt that the citizenry of Polk County, Florida, as a whole had not been prejudiced against this petitioner.

The Circuit Court stated sound reasoning on this matter thusly:

> "Whether the adverse publicity prevented the appellee from securing a fair trial was a question primarily addressed to the judgment of the trial court. ***There was more than substantial evidence to support its decision.*** It properly accorded weight to the examination of the jurors on voir dire and to the lack of difficulty in choosing a Jury. 22 C. J. S., Criminal Law, § 196 b, pp. 312, 313. It was on the ground at the time of trial; it saw and heard the voir dire examination of the jurors; it was in much better position to know the local sentiment and to hear and decide the motion for change of venue than was the federal district court." (Emphasis supplied.)

The respondent takes sharp issue with the flat statement on page 6 of the petition that petitioner had been depicted as the operator of a diabolical gang: (the *Mafia*). There is nothing in the record cited by petitioner to support this statement and nothing to warrant a reasonable conclusion of such fact.

CONCLUSION

The evidence in this case clearly demonstrated that there was but one vast lottery operation covering several counties, involving numerous persons. The activities of the lottery sellers or writers were generally limited to Polk County; others performing activities in several counties. The lottery operation was "backed" and "banked" by petitioner.

There was no unusual difficulty in selecting the jury.

The state trial court and the Supreme Court of Florida have not denied the petitioner due process of law or any other constitutional right.

We respectfully submit that the opinion and judgment of the Court of Appeals for the Fifth Circuit is eminently correct and this petition should be denied.

Respectfully submitted,

Richard W. Ervin
Attorney General

George E. Owen
Assistant Attorney General

Counsel for Respondent.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true copy of the foregoing Brief in Opposition to Granting Writ of Certiorari has been furnished to Honorable Claude Pepper, 37 N. E. First Avenue, Miami 32, Florida and Whitaker Brothers, 308 Tampa Street, Tampa, Florida, Attorneys for Petitioner, by mailing a copy of same to them at the above addresses, this the 14th day of April, A. D. 1958.

George E. Owen

George E. Owen